88-633

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal district court, pursuant to Fed.R.Civ.P. 60(a), enlarge a judgment more than one year after its rendition for the purpose of conforming the judgment to the parties' pretrial stipulation when such enlargement affects the substantive rights of the parties?

2. Does a federal district court acting pursuant to Fed.R. Civ.P. 60(a) have jurisdiction to enlarge a judgment affirmed in whole on appeal and after the appellate court's mandate has issued?

LIST OF PARTIES

Petitioners, defendants below, are Mansion House Center North Redevelopment Company, a limited partnership, Mansion House Center South Redevelopment Company, a limited partnership, Mansion House Center Redevelopment Company, a limited partnership, and Francis E. Darcy, General Partner.

Respondent, plaintiff below, is the United States of America.

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MANSION HOUSE CENTER NORTH
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On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mansion House Center North Redevelopment Company, Mansion House Center South Redevelopment Company, Mansion House Center Redevelopment Company and Francis E. Darcy respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 19, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in Appendix A (App. A-1).

The Memorandum and Order of the United States District Court for the Eastern District of Missouri, Eastern Division, dated December 2, 1985, as amended December 5, 1985, are reported at 623 F.Supp. 81 (E.D.Mo. 1985). They are reprinted in Appendixes B and C, respectively (App. A-6; App. A-10).

The Memorandum and Order of the United States District Court for the Eastern District of Missouri, Eastern Division, dated December 24, 1987, are reported at 118 F.R.D. 487 (E.D.Mo. 1987), and are reprinted in Appendixes D and E, respectively (App. A-13; App. A-30).

The Supplemental Order of the United States District Court for the Eastern District of Missouri, Eastern Division, is not reported. It is reprinted in Appendix F (App. A-32).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on August 19, 1988. No petition for rehearing was sought. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 60(a). Relief From Judgment or Order: Clerical Mistakes.

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court

Federal Rule of Civil Procedure 60(b)(1). Relief From Judgment or Order: Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect;... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The United States ("Respondent") filed suit to foreclose three deeds of trust and three security agreements which secured Petitioners' mortgage indebtedness on three apartment towers and associated personal property. The parties stipulated that, subject to Petitioners' affirmative defense, Respondent was entitled to judgment foreclosing the deeds of trust and the security instruments and ordering the sale of both the realty and personalty.

On December 2, 1985, the district court entered judgment in favor of Respondent foreclosing the deeds of trust and ordering

the sale of the Petitioners' interest in the mortgaged real estate. The district court did not, however, foreclose the security interests in, or order the sale of, the personal property. On December 6, 1985, Petitioners sought and obtained a stay pending appeal pursuant to Fed.R.Civ.P. 62. Although Respondent and Petitioners appealed from the district court's judgment, none of the parties filed post-trial motions calling the district court's attention to its failure to foreclose the security interests.

On July 17, 1986, the Eighth Circuit Court of Appeals issued its judgment affirming the district court's December 2, 1985 order, and denied rehearing on August 18, 1986. The Eighth Circuit's mandate was filed on August 28, 1986.

On January 16, 1987, more than one year after the district court had entered final judgment, Respondent moved for the first time to supplement the district court's December 2, 1985 judgment to provide for the foreclosure of the three security agreements covering personal property and works of art and the simultaneous sale of the personalty with the realty. Petitioners opposed this motion on the grounds that the Respondent was seeking to correct a judicial mistake or inadvertence affecting the substantive rights of the parties. Such relief was available only under Fed.R.Civ.P. 60(b)(1) and was time barred because the Respondent's motion was filed more than one year after final judgment.

Petitioners further argued that the mandate rule prevented the district court from altering, amending or enlarging the judgment which had been affirmed in whole on appeal. The Eighth Circuit's mandate did not remand the case for any further proceedings. Respondent contended that the relief it sought involved no more than the correction of a clerical error, which relief was available at any time under Fed.R.Civ.P. 60(a).

On December 24, 1987, the district court entered an interim order granting Respondent's motion to foreclose the security

agreements, *see United States v. Mansion House Center Redevelopment Co.*, 118 F.R.D. 487 (E.D.Mo. 1987), and in a further unreported supplemental order entered on January 22, 1988, directed the judicial sale of the personalty and works of art. The district court acknowledged that Respondent's motion was a request for additional relief, but held that the court's failure to include in its original order the foreclosure of the three security agreements and sale of the personalty was a mere clerical error remediable under Fed.R.Civ.P. 60(a).

Petitioners appealed from the district court's orders foreclosing the security agreements and ordering the sale of the personalty. Petitioners obtained a stay pending appeal. *See United States v. Mansion House Center Redevelopment Co.*, 682 F.Supp. 446 (E.D.Mo. 1988). On August 19, 1988, the Eighth Circuit entered its judgment affirming the supplemental orders of the district court and issued its mandate. Petitioners did not file a petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Creates A Conflict Among The Circuits Concerning The Construction Of Fed.R. Civ.P. 60(a) And 60(b)(1).

Fed.R.Civ.P. 60(a) allows courts to correct clerical mistakes and errors arising from oversight or omission. Thus, Rule 60(a) "can only be used to make the judgment ... speak the truth and cannot be used to say something other than what was originally pronounced." 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2854, at 149 (1973) (footnote omitted). The matters remediable under Rule 60(a) "are not errors of substantive judgment or errors that determine substantive rights of the parties." *Willie v. Continental Oil Co.*, 746 F.2d 1041, 1045 (5th Cir. 1984), *aff'd en banc*, 784 F.2d 706 (5th Cir. 1986). *See United States ex rel. Control Systems, Inc. v. Arundel Corp.*, 814 F.2d 193, 197 n.5, *on reh'g*, 826 F.2d 299 (5th Cir. 1987); *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

To the contrary, the Eighth Circuit has held in this case that the district court's entry of a judgment omitting certain substantive terms of the parties' pretrial stipulation was a clerical error subject to modification under Rule 60(a), even though the modification enlarged the relief originally granted and affected the substantive rights of the parties. On almost identical facts, the Fifth Circuit has classified such an omission as the product of judicial mistake or inadvertence remediable only under Rule 60(b)(1). *See Willie v. Continental Oil Co.*, 746 F.2d at 1045. The Fifth Circuit expressly rejected the argument that a motion to amend the judgment to conform to the parties' pretrial stipulation was cognizable under Rule 60(a),

> since that rule permits only the correction of errors which are created by mistake, oversight or omission, and are clerical in nature. Although Rule 60(a) errors need not be made by the clerk, they must be in the nature of a clerical or amanuensis-type mistake. *They are not errors of*

> *substantive judgment or errors that determine substantive rights of the parties.*

Id. (citations omitted) (emphasis added). The Fifth Circuit held that such a motion could be maintained only under Rule 60(b)(1).

> This rule permits the district court to correct a judgment which is erroneous, and caused by mistake, inadvertence, surprise or excusable neglect. . . . *[T]he amendment of the judgment in this case to reflect the stipulations of the parties involves the substantive rights of the parties, and is more than a clerical mistake.*

Id. (emphasis added).

Other circuits have held that a motion seeking to effect a substantive change in a judgment is not cognizable under Rule 60(a). *See Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986); *Mullins v. Nickel Plate Mining Co.,* 691 F.2d 971, 973-74 (11th Cir. 1982).

In the present case, the parties entered into a pretrial stipulation providing for the foreclosure of Petitioners' interests in the Mansion House realty and personalty in the event the district court rejected Petitioners' affirmative defense to Respondent's foreclosure action. Petitioners were unsuccessful before the district court, which entered an order in conformity with the parties' pretrial stipulation concerning the foreclosure of the realty only. The order was silent with regard to the personalty. This order was affirmed in whole on appeal, and the mandate issued without remand for further proceedings.

More than a year after the entry of final judgment, Respondent for the first time moved to modify the judgment to provide for the foreclosure and sale of Petitioners' interest in the Mansion House personalty. The district court granted the motion pursuant to Fed.R.Civ.P. 60(a). (Relief was not available under Rule 60(b)(1) because the one-year limitation had expired.)

Unlike the Fifth Circuit, however, the Eighth Circuit affirmed on the ground that the trial court's inadvertence in failing to provide for the foreclosure and sale of the personalty in conformity with the parties' pretrial stipulation was a mere clerical error remediable under Rule 60(a).

Thus, a direct conflict exists between the Eighth Circuit and every other circuit which has ruled on the availability Rule 60(a) to modify a judgment where the modification affects the substantive rights of the parties. This conflict between the circuits becomes critical in light of the district court's characterization in the present case of Respondent's motion to supplement the judgment to include foreclosure of the personalty as "requests for additional relief." *See United States v. Mansion House Center Redevelopment Co.*, 118 F.R.D. at 489. Because these "requests for additional relief" would affect the substantive rights of the parties, these "requests" were appropriately subject to the strictures of Rule 60(b)(1), rather than Rule 60(a) invoked by the district court. The Eighth Circuit's holding to the contrary is an aberration reflecting a marked departure from the generally accepted interpretation of Rule 60(a) extant in the other circuit courts.

If the Eighth Circuit's decision is allowed to stand, the line of demarcation between those matters remediable under Rule 60(a) as clerical errors and under Rule 60(b)(1) as mistakes or inadvertence will be irreparably blurred. To date the bright line test distinguishing Rule 60(b)(1) motions has been that the relief sought affected the substantive rights of the parties or involved errors of substantive judgment. The Eighth Circuit has not only abandoned this standard in the present case, but has also failed to articulate any rational substitute. The effect of the Eighth Circuit's ruling, then, is to place in jeopardy the finality of all judgments and subject them to alteration, amendment or enlargement at the whim of any court which decides it is unhappy with an earlier decision, regardless of the effect of such changes on the parties. Such a subversion of the intent of Rule

60(a) — to make the record speak the truth and reflect what the court actually did or said — so violently deviates from the plain meaning of the rule and from the decisions of every other circuit court construing Rule 60(a) that review by this Court is imperative.

II. The Decision Creates A Conflict Among The Circuit Courts And District Courts Regarding The Jurisdiction Of The District Courts, After Issuance Of The Mandate, To Enlarge A Judgment Under Fed.R.Civ.P. 60(a).

The Eighth Circuit's ruling in this case affirming the judgment of the United States District Court for the Eastern District of Missouri is in direct conflict with the decisions of this Court and other federal appellate and district courts. The Eighth Circuit has ruled that a district court may enlarge a judgment under Fed.R.Civ.P. 60(a) after a "straight affirmance" without remand on appeal for further proceedings. This holding is in direct conflict with decisions in *Frasier v. Public Service Interstate Transportation Co.*, 254 F.2d 132, 135-36 (2d Cir. 1958) (Moore, J., concurring); *Home Indemnity Co. v. O'Brien,* 112 F.2d 387, 388 (6th Cir. 1940), *overruled on other grounds,* 429 U.S. 17, 18 (1976); and *Albion-Idaho Land Co. v. Adams,* 58 F.Supp. 579, 581 (D. Idaho 1945). Moreover, the present decision is contrary to the ruling of the Eighth Circuit in *Thornton v. Carter,* 109 F.2d 316, 319-20 (8th Cir. 1940). All these cases stand for the proposition that the district court lacks jurisdiction to alter, amend or examine the mandate of the appellate court after a "straight affirmance" (*i.e.*, when the district court's judgment has been affirmed in whole) and when there has been no remand to the district court for further proceedings.

In these circumstances, the district court's jurisdiction is limited to the execution of the mandate according to its terms. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). *See Briggs v. Pennsylvania Railroad Co.*, 335 U.S. 304, 306 (1948)

("an inferior court has no power to or authority to deviate from the mandate issued by an appellate court"); *In re Union Steamboat Co.*, 178 U.S. 317, 318-19 (1900); In re Washington & Georgetown Railroad Co., 140 U.S. 91, 95-97 (1891) (upon affirmance of judgment by appellate court, inferior court may not enlarge the relief granted). This proposition of law is commonly referred to as the "mandate rule." *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.404[10], at 172 (2d ed. 1984).

Fed.R.Civ.P. 60(a) does not alter the mandate rule, as the Eighth Circuit's decision implicitly holds. The Sixth Circuit found in *Home Indemnity Co. v. O'Brien*, 112 F.2d at 388, that Rule 60(a)

> does not confer upon District Courts the power to alter or amend a judgment affirmed by this court or by the Supreme Court of the United States, for such alteration or amendment would be not the correction of a mistake, judicial or clerical, but an alteration or amendment of a decision of the reviewing court, *which it is not within the power of the District Courts to do.*

(Emphasis added).

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1302

United States of America,
Appellee,

v.

Mansion House Center North Redevelopment Company, et al.,
Appellants.

Submitted June 24, 1988

Filed August 19, 1988

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLE, District Judge.*

PER CURIAM.

Appellants in these consolidated foreclosure actions contest the district court's[1] modification and clarification of its December 2, 1985 judgment, after that judgment was affirmed by this court. Finding no abuse of discretion, we affirm.

The United States, appellee, filed these three foreclosure actions against the appellants, the owners of the Mansion House Center towers (Owner-Partnerships), in May of 1979 after the Owner-Partnerships defaulted on their mortgage payments to the Department of Housing and Urban Development (HUD).[2]

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*The Honorable Charles R. Wolle, United States District Court Judge for the Southern District of Iowa, sitting by designation.

[1] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] HUD acquired the notes, deeds of trust and security agreements concerning the Mansion House properties by assignment from private lenders in 1972 after the Owner-Partnerships defaulted on HUD insured loans.

> Each suit involved a Deed of Trust Note and a Deed of Trust executed in 1964, and a Security Agreement executed in 1967. Each Deed of Trust Note was secured by the corresponding Deed of Trust and later by the corresponding Security Agreement. Each Deed of Trust mortgaged the respective defendants' leasehold interests in the land underlying what are now known as the Mansion House Center towers, together with the entirety of the respective defendants' interests in the towers to be constructed on the land and interests in the fixtures to be installed in those towers. That is, by the Deeds of Trust, defendants mortgaged (in addition to their leasehold interests in the land) both their leasehold interests in the towers and fixtures and their fee interests, if any, in the towers and fixtures. Each Security Agreement pledged as security certain personal property located in or attached to or belonging to the tower which was later constructed on the land involved in the corresponding Deed of Trust and Deed of Trust Note.

United States v. Mansion House Center Redevelopment Co., 118 F.R.D. 487, 491-92 (1987) (footnotes omitted). In each of these actions the government sought, *inter alia,* an order of foreclosure on the respective deeds of trust and security agreements, and sale of the subject property, in order to satisfy the indebtedness of the deed of trust notes and certain money judgments against the appellants.

Eventually, on August 12, 1985, after years of litigation and numerous appeals to this court, these foreclosure actions were tried to the district court sitting without a jury. At that time the parties stipulated that the United States was entitled to a separate judgment in each of the foreclosure actions, unless the Owner-Partnerships prevailed on their sole defense that HUD was obligated to settle the cases pursuant to the parties' August 18, 1982 settlement agreement, as amended. On December 2, 1985, the district court rejected the defense asserted by the Owner-Partnerships, entered judgment in favor of the United

States in each of the foreclosure actions, and ordered that all Mansion House Center realty described in the respective deeds of trust be sold for cash to the highest bidder. Several days later the district court stayed its order of foreclosure pending the Owner-Partnerships' appeal to this court. On July 17, 1986, we affirmed the district court's judgment in full. *United States v. Mansion House Center Redevelopment Co.*, 796 F.2d 1039 (8th Cir. 1986).

Thereafter, on January 16, 1987, the United States filed a motion for supplemental order in the district court seeking an order to (1) foreclose the Owner-Partnerships' leasehold interests in the Mansion House Center towers, (2) sell the Mansion House Center towers' fixtures, personal property and works of art, and (3) foreclose the Owner-Partnerships' interest in Mansion House Center Land Redevelopment Corporation, the fee owner of the land on which the Mansion House Center towers are located.[3] The Owner-Partnerships in turn filed a motion to dismiss the government's motion, arguing that the district court lacked jurisdiction to alter, amend, modify, or enlarge the court's December 2, 1985 judgment after it had been affirmed by this court on appeal.

On December 24, 1987, the district court granted in part and denied in part the government's motion for supplemental order. First, the district court concluded that it had jurisdiction pursuant to Fed. R. Civ. P. 60(a) to correct errors of omission or oversight in its prior judgment, order and memorandum, even though the judgment had been affirmed on appeal. The district court then noted that because both the December 2, 1985 memorandum and order "were intended to be read in the context of: (1) the three complaints, (2) the preceding decisions of

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[3] As explained in the district court's opinion, Mansion House Center Land Redevelopment Corporation is not, and has not, been a party to this action or to any other Mansion House litigation in federal court.

this Court and of the Eighth Circuit in the Mansion House litigation, and, most importantly, (3) the parties' 61 stipulations of fact (some 19 pages)," and because of the court's own desire for brevity, various understood facts and conclusions were omitted from the memorandum and order as an oversight. *Mansion House Center Redevelopment Co., supra,* 118 F.R.D. at 493. Stating that the court intended and the parties understood that in the event the Owner-Partnerships' sole defense to foreclosure was rejected the Owner-Partnerships' entire ownership interests described in the three deeds of trust would be foreclosed, including their (a) leasehold interests in the land, the towers and its fixtures, and (b) fee interests, if any, in the towers, its fixtures, and personal property, the district court concluded that the government was entitled to a supplemental order specifically foreclosing those interests. Lastly, the district court concluded that the government was not entitled to foreclosure of the Owner-Partnerships' beneficial interests in Mansion House Center Land Redevelopment Corporation, the fee owner of the land. The court noted that although the Owner-Partnerships now owned all of the beneficial interest in that corporation by virtue of a consent decree in 1984, the corporation was neither a party to this litigation nor to other Mansion House litigation in federal court. Subsequently, on January 22, 1988, the district court entered a supplemental order, foreclosing the Owner-Partnerships' interests in the three deeds of trust and directing the sale of all subject interests and property.

In this appeal, the Owner-Partnerships assert that the district court exceeded its authority under Fed. R. Civ. P. 60(a) by substantially modifying its December 2, 1985 order. Specifically, the Owner-Partnerships argue that Rule 60(a) authorizes only corrections of clerical or mechanical errors, not deliberate omissions by the court, and that the rule was not intended to permit the reopening of a final judgment upon a party's assertion that the judgment is flawed in some way. The Owner-Partnerships also assert that the district court erred in granting

the requested relief because the government's motion to alter judgment was filed out of time under Rules 59(e) and 60(b).

Having carefully considered the record and parties' briefs, we find no abuse of discretion in the district court's modification and clarification of its December 2, 1985 judgment. This court has previously recognized that under Rule 60(a) the district court has the power to correct omissions in its judgment so as to reflect what was understood, intended and agreed upon by the parties and the court. *Pattiz v. Schwartz,* 386 F.2d 300, 303 (8th Cir. 1968). We are convinced that the district court's supplemental judgment and orders, dated December 24, 1987 and January 22, 1988, merely clarify the court's intentions and parties' understandings, which were inadvertently omitted from the court's December 2, 1985 judgment.

We also find appellants' argument that the government's motion for supplemental order was filed out of time to be without merit. Rule 60(a) clearly provides that "errors * * * arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party * * *." Under the circumstances of this complex case, we find that the government's delay in requesting clarification of the district court's prior order was neither unreasonable nor prejudicial to the appellants.

Accordingly, we affirm. Mandate of this court shall issue forthwith.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Consolidated Action Nos.
79-616C(1), 79-617C(1), 79-618C(1)

United States of America,
Plaintiff,

v.

Mansion House Center Redevelopment Company, et al.,
Defendants.

MEMORANDUM

(Filed Dec. 2, 1985)

(As Amended Dec. 5, 1985)

The United States, on behalf of the Secretary of Housing and Urban Redevelopment (HUD), filed these three actions for foreclosure of what is collectively known as the Mansion House Center.

This case was tried to this Court sitting without a jury. The Court having considered the pleadings, the documents in evidence, and the stipulations of the parties which are incorporated herein by reference, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure.

The Mansion House litigation spans numerous years and has resulted in a number of decisions from both this Court and the Eighth Circuit Court of Appeals. While many of the prior decisions involved complex issues and hard fought battles in the courtroom, the underlying facts and issues in this proceeding

are relatively simple and straightforward. The parties have stipulated to all the necessary facts upon which this Court renders its decision. They are briefly reiterated here for purposes of information and clarity.

The Mansion House Center consists of three 28-story towers in downtown St. Louis, Missouri. The three towers are respectively owned by three separate limited partnerships (the Owner Partnerships), namely Mansion House Center Redevelopment Company (Center Tower), Mansion House Center North Redevelopment Company (North Tower) and Mansion House Center South Redevelopment Company (South Tower). The towers were constructed with proceeds from three mortgage loans made in 1964 to the respective Owner Partnerships. These loans totaled over $35 million and were insured by HUD pursuant to Section 220 of the National Housing Act. 12 U.S.C. §1715K (1976). The projects soon began to experience financial difficulties and several modifications of the mortgage obligations were required. In 1971, however, additional modifications proposed by the Owner Partnerships were refused by the private lenders and the notes went into default. The private lenders subsequently assigned the notes, deeds of trust and security agreements to HUD. In return, HUD was required to pay mortgage insurance claims totaling approximately $35.3 million.

Following the assignment of the notes to HUD, a modification of each of the mortgages was agreed upon between HUD and the Owner Partnerships. A number of events occurred in the subsequent years, including the conversion of the South Tower to a motor hotel and the appointment of a receiver at the request of the United States. These events, while adding to the complexity of the situation, are not relevant to this decision. What is relevant and the parties have stipulated to, is that as of May, 1979 payments on the mortgage were not current. HUD rejected a financing program offered by the Owner Partnerships and in May, 1979, filed these three foreclosure actions. The uncontested evidence introduced at trial by the Government in-

dicated that as of August 12, 1985 the amounts due on the mortgages were as follows: North Tower (FHA No. 085-32008) $16,196, 724.30; Center Tower (FHA No. 085-32009) $18,159, 863.33; and South Tower (FHA No. 085-32010) $18,069,574.47. The parties stipulated that the Government properly declared due and payable, the entire principal sum and accrued interest as provided in each note, deed of trust and security agreement. Finally, the parties stipulated that the United States is entitled to a separate judgment in each of the foreclosure cases, subject to the defendants' defense that HUD should be compelled to settle these cases under the terms contained in the August 18, 1982 settlement agreement, as amended.

The Secretary of HUD has very broad discretions to exercise in deciding whether to foreclose an insured mortgage upon default. This exercise of discretion is subject to judicial review under §702 of the Administrative Procedures Act (APA), 5 U.S.C. §701 *et seq. United States v. Victory Highway Village,* 662 F.2d 488, 494 (8th Cir. 1981). The party resisting foreclosure has the burden of introducing evidence of arbitrary or capricious action, abuse of discretion or failure to comply with applicable law. *Id.* The parties have stipulated that the notes are in default. Accordingly, this Court finds, based on the stipulations filed by the parties and the evidence adduced at trial that HUD's decision to foreclose on the properties is consistent with the national housing objectives which are stated in §2 of the Housing Act, 42 U.S.C. §1441 (1976).

Defendants have elected not to challenge the propriety of the Government's decision to foreclose on the Mansion House Towers. The Owner Partnerships have produced no evidence that HUD's action to foreclose is arbitrary, capricious, an abuse of discretion or a failure to comply with the applicable law. Instead, the Owner Partnerships assert the affirmative defense that HUD should be compelled to effectuate the settlement agreement, entered into by the respective parties on August 18, 1982. On April 4, 1985, this Court denied a motion filed on

behalf of the Owner Partnerships to compel HUD to accept the terms of that settlement agreement. Defendants' appeal of the order was dismissed for lack of jurisdiction by the Eighth Circuit. *United States v. Mansion House Center North Redevelopment Company*, No. 85-1469-EM (May 23, 1985). This Court again rejects this affirmative defense for the reasons stated in the April 4, 1985 order.

The Owner Partnerships have also attempted to demonstrate that much of the litigation surrounding the Mansion House Properties has come to a close. As a result, the Owner Partnerships contend that HUD should now be forced to accept the terms of the settlement agreement. This Court disagrees. As this Court previously stated, the inquiry as to whether the titles were unmarketable must be made as of the time HUD decided to exercise its option to refuse to consummate the settlement agreement. Therefore, subsequent developments that allegedly remove some of the title problems associated with the properties in question are now irrelevant to the affirmative defense asserted by the defendants. Having rejected the sole defense asserted by the Owner Partnerships, this Court directs that the three towers collectively known as the Mansion House Center be sold according to the terms of the attached Order of this Court.

/s/ John F. Nangle
United States District Judge

Dated: December 2, 1985, as amended

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Consolidated Action No.
79-616C(1), 79-617C(1), 79-618C(1)

United States of America,
Plaintiff,

v.

Mansion House Center Redevelopment Company, et al.,
Defendants.

ORDER

(Filed Dec. 2, 1985)

(As Amended Dec. 5, 1985)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that a judgment be and is entered in favor of the plaintiff in each of these three causes of action.

IT IS FURTHER ORDERED that the United States Marshal is authorized and directed to sell at public vendue between the hours of 9:00 a.m. and 5:00 p.m. at the east front door of the Court House (Civil Courts Building, Eleventh and Market Streets) in the City of St. Louis, Missouri, on such date as he shall determine but as expeditiously as practicable, all of the realty described in the Deeds of Trust for FHA No. 085-32008 (North Tower), FHA No. 085-32009 (Center Tower) and FHA No. 085-32010 (South Tower), to the highest bidder for cash. The following shall be followed in selling said realty:

1. Said realty shall be offered for sale in bulk (as one unit).

2. Said realty shall then be offered for sale as three separate parcels. The higher of the total amounts bid under 1 and 2 above shall be the successful bid (or bids). Said sales shall be conducted on the date and time determined by the United States Marshal.

A sale shall be deemed to be for cash if the successful bidder or bidders shall deposit with the Marshal not later than 24 hours after the sale shall have been concluded, cashier(s) or certified check(s) payable to the Marshal in an amount not less than $300,000.00 for a bulk sale or $100,000.00 per parcel in separate sales and shall within 30 days after the conclusion of the sale have deposited with the Marshal cashier(s) or certified check(s) payable to the Marshal for the balance of the bid price.

The United States Marshal is authorized and directed to effect notice of the sale by publication once a week for at least four weeks prior to the sale in a newspaper regularly issued and of general circulation in the City of St. Louis, Missouri. HUD, at its discretion, may direct additional publication in other newspapers outside the St. Louis area.

Within five working days following conclusion of the sale, the Marshal shall file his report of the sale with this Court who will sua sponte and upon such notice as this Court deems appropriate, set the matter for confirmation of the sale. Upon confirmation of the sale and receipt by the Marshal of the full purchase price from the successful bidder the Marshal shall issue his certificate of sale and shall cause to be paid over to the Secretary of Housing and Urban Development, after deduction of all his costs and expenses of sale, such sum as shall be necessary to pay in full the aggregate of the mortgage hereinbefore determined by this Court and any excess funds shall be held by the Marshal subject to further order of this Court.

Should the net proceeds of the sale be insufficient to satisfy in full the aggregate indebtedness due and owing the United States

of America, such net proceeds shall be paid to the Secretary of Housing and Urban Development and shall be applied by him in accordance with such further order as this Court may enter.

Upon receipt by the Secretary of payment of the sale proceeds he shall discharge the aggregate non-recourse mortgage indebtedness, subject only to the rights reserved to the Secretary under paragraph 17 of the Regulatory Agreements.

The Marshal shall make no representation as to title to the realty subject to the sale, but the quality and condition of title shall be at the sole risk of the successful bidder.

/s/ John F. Nangle
United States District Judge

Dated: December 2, 1985, as amended

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Consolidated Action Nos.
76-20C(1), 79-616C(1), 79-617C(1), 79-618C(1)

United States of America,
Plaintiff,

v.

Mansion House Center Redevelopment Company, et al.,
Defendants.

MEMORANDUM

(Filed Dec. 24, 1987)

Introduction

The Mansion House litigation is now before the Court on plaintiff United States of America's Motion for Supplemental Order and on defendants Mansion House Center Redevelopment Company, et al.'s Motion to Dismiss Plaintiff's Motion for Supplemental Order for Lack of Jurisdiction.

In 1979, plaintiff filed the three foreclosure cases, Numbers 79-616C(1), 79-617C(1), and 76-618C(1), against defendants. On December 2, 1985, pursuant to an Order and a Memorandum issued that day, this Court entered judgment in plaintiff's favor in each of the three foreclosure cases and ordered a foreclosure sale.[1] On December 6, 1985, this Court stayed its

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[1] On December 5, 1985, this Court, by a Nunc Pro Tunc order, modified a portion of the December 2, 1985, Order in a manner not relevant to the present motions by changing the minimum amount of earnest money to be deposited with the Marshal from $3,000/$1,000 to $300,000/$100,000.

order of foreclosure pending defendants' appeal. On July 17, 1986, the Eighth Circuit Court of Appeals affirmed this Court's judgment in full. *United States v. Mansion House Center Redevelopment Company,* 796 F.2d 1039 (8th Cir. 1986). On August 18, 1986, the Eighth Circuit denied defendants' petition for rehearing.

In the Court's Order of December 2, 1985, the Court ordered the United States Marshal to sell "all of the realty described in" the three Deeds of Trust which were the subject of the three foreclosure cases. On January 16, 1987, plaintiff filed the instant Motion for Supplemental Order seeking, in substance, an order from this Court directing the United States Marshal to sell, convey, and deliver: (1) the respective leasehold interests of defendants Mansion House Center Redevelopment Company, Mansion House Center North Redevelopment Company, and Mansion House Center South Redevelopment Company in the Center Tower, the North Tower, and the South Tower; (2) all furniture, fixtures, equipment, supplies, vehicles, works of art, and all other chattels and personal property located in or attached to or belonging to the Mansion House Center towers; and (3) the interest of defendants Mansion House Center Redevelopment Company, Mansion House Center North Redevelopment Company, and Mansion House Center South Redevelopment Company in Mansion House Center Land Redevelopment Corporation. Because defendants' leasehold interests in the three towers is part of the "realty" described in the three Deeds of Trust, the first element of plaintiff's requested relief is part of the relief which the Court ordered by ordering the Marshal to sell "all of the realty described in" the three Deeds of Trust. The second element of plaintiff's requested relief (though possibly implied by the Court's sale order) is not specifically within the ambit of the Court's sale order. The third element of plaintiff's requested relief was not within the ambit of and was not contemplated by the Court's sale order. For the purposes of this memorandum, the Court deems the second and third elements of requested relief to be requests for additional relief.

Defendants oppose plaintiff's motion. Defendants contend that, as plaintiff did not obtain the additional two elements of relief in the Court's judgment of December 2, 1985, plaintiff is attempting to alter, amend, modify, and enlarge upon the relief obtained in the December 2, 1985, judgment. Defendants contend that this Court lacks jurisdiction to so alter, amend, modify, or enlarge upon the December 2, 1985, judgment after the Eighth Circuit affirmed that judgment.

Jurisdiction

Federal Rule of Civil Procedure 60(a) provides in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Fed.R.Civ.P. 60(a). Rule 60(a) permits the correction of errors in judgments, orders, and other parts of the record arising from oversight and omission. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2854 at 148 (1973).

In *Pattiz v. Schwartz,* 386 F.2d 300 (8th Cir. 1968), the Eighth Circuit, speaking through then Circuit Judge Blackmun, approved of the district court's use of Rule 60(a) to effectuate a "correction in the formal record of a gap or error 'arising from oversight or omission,' . . ." 386 F.2d at 303. A district court can utilize Rule 60(a) to implement "what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending." *Id.* In *Pattiz v. Schwartz,* "the intent of the parties and, indeed, of the trial court itself, [was] clear." *Id.* Thus, the district court's corrective action " 'result[ed] simply in the record speaking the truth'." 386 F.2d at 303 (quoting the district court at 41 F.R.D. 456, 459 (E.D.Mo. 1967)). The Eighth Circuit also

noted that Rule 60(a) is not confined to mistakes of the clerk, but also includes mistakes of the court. 386 F.2d at 303.

Rule 60(a) is the appropriate procedural vehicle to correct "mistakes [occurring] between the design of a judgment and its implementation;" to correct "the translation of the original meaning to the judgment." *United States v. Griffin,* 782 F.2d 1393, 1396 (7th Cir. 1986). Rule 60(a) may be used to correct drafting errors, to make the judgment carry out the intent of the court. *Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986). "Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake did another. Such a mistake must not be one of judgment or even misidentification, but merely of recitation. . . ." *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co. v. Century Forest Industries, Inc.,* 694 F.2d 112, 114 (5th Cir. 1982). Rule 60(a) may be used to correct the failure to memorialize part of a decision. *Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc.,* 784 F.2d 665, 669 (5th Cir.), *cert. denied,* 107 S.Ct. 398 (1986). "[I]f the intention of the judge to include a particular provision in the judgment was clear, but he neglected to include the provision, [Rule 60(a)] authorizes correction of the judgment." 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2854 at 153. *See Whitemere Development Corp. v. Township of Cherry Hill,* 787 F.2d 185, 187-188 (3rd Cir. 1986). *See generally,* 13 A.L.R. Fed. 794.

Rule 60(a) may be employed even after the district court's judgment has been affirmed on appeal. "As long as the appellate court [did] not expressly or implicitly rule[ ] on the issue, the district court [does] not transgress[ ] any jurisdictional boundaries by amending after an appeal has been taken." *Panama Processes, S.A. v. Cities Service Co.,* 789 F.2d 991, 994 (2nd Cir. 1986). Thus, this Court has jurisdiction under Rule 60(a) to correct errors in its judgment, order, and memorandum arising from omission or oversight, even though the Court's judgment has been affirmed on appeal, so long as the Court's

corrections do not alter or amend anything expressly or implicitly ruled on by the Eighth Circuit. *Id.* and cases cited therein.

This Court's power to correct errors of omission and oversight under Rule 60(a) "may be exercised at any time, either on motion or on the court's own initiative." 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2854 at 149 (1973). Yet, prior to 1976, most courts, including the Eighth Circuit,[2] took the position that a district court lacks jurisdiction to entertain a Rule 60 motion after its judgment has been affirmed on appeal, unless the appellate court has first given leave. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2856 at 157 & n. 68, and §2873 at 266-270 & n. 23. However, in 1976 in *Standard Oil Co. of California v. United States,* 429 U.S. 17 (1976) (per curiam), the Supreme Court held that a district court can entertain a Rule 60(b) motion after its judgment has been affirmed without leave of the appellate court. *Id.* at 19. *See Gould v. Mutual Life Insurance Co. of New York,* 790 F.2d 769, 773 (9th Cir.), *cert. denied,* 107 S.Ct. 580 (1986). Likewise, a district court can now entertain a Rule 60(a) motion after its judgment has been affirmed without leave of the appellate court. *See Panama Processes, S.A. v. Cities Service Co.,* 789 F.2d 991, 993-995 (2nd Cir. 1986).

Thus, the Court has jurisdiction to entertain plaintiff's Motion for Supplemental Order under Rule 60(a) and may proceed without leave of the Eighth Circuit.

At this point, the Court notes that plaintiff is not guilty of laches or any other equitable defenses with respect to this Rule 60(a) motion. This Court stayed its December 2, 1985, Order pending appeal. The Eighth Circuit affirmed on July 17, 1986, and denied rehearing on August 18, 1986. The Eighth Circuit's mandate was filed on August 28, 1986. Plaintiff filed its Motion for Supplemental Order on January 16, 1987, less than five months after the Eighth Circuit's mandate was filed.

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[2] *See Hartman v. Lauchli,* 304 F.2d 431, 432-433 (8th Cir. 1962).

The Mansion House Litigation

On May 23, 1979, plaintiff filed suits against: (1) Mansion House Center Redevelopment Company (a limited partnership) and its general partners (Number 79-616C(1)); (2) Mansion House Center North Redevelopment Company (a limited partnership) and its general partners (Number 79-617C(1)); and (3) Mansion House Center South Redevelopment Company (a limited partnership) and its general partners (Number 79-618C(1)). Each suit involved a Deed of Trust Note and a Deed of Trust executed in 1964, and a Security Agreement executed in 1967. Each Deed of Trust Note was secured by the corresponding Deed of Trust and later by the corresponding Security Agreement. Each Deed of Trust mortgaged the respective defendants' leasehold interests in the land underlying what are now known as the Mansion House Center tower, together with the entirety of the respective defendants' interests in the towers to be constructed on the land and interests in the fixtures to be installed in those towers.[3] That is, by the Deeds of Trust.

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[3] Each Deed of Trust mortgages the defendants' leasehold estate interest in the parcel of land on which the particular Mansion House Center tower is now located:

> "TOGETHER with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein.
>
> TOGETHER with all buildings and improvements of every kind and description now or hereafter erected or placed thereon, and all fixtures, including but not limited to all gas and electric fixtures, engines, machinery, radiators, heaters, furnaces, heating equipment, steam and hot water boilers, stoves, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating equipment, cabinets, mantels, refrigerating plant and refrigerators, whether mechanical or otherwise cooking apparatus and appurtenances, furniture, shades, awnings, screens, venetian blinds and other furnishings; and

defendants mortgaged (in addition to their leasehold interests in the land) both their leasehold interests in the towers and fixtures *and* their fee interests, if any, in the towers and fixtures.[4] Each

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> All articles of personal property owned by the party of the first part and now or hereafter attached to or used in and about the buildings or buildings now erected or hereafter erected on the lands herein described which are necessary to the complete and comfortable use and occupancy of such building or buildings for the purposes for which they were or are to be erected, including all goods and chattels and personal property as are ever used or furnished in operating a building or the activities conducted thereon similar to the one herein described and referred to, and all renewals or replacements thereof or articles in substitution thereafter, whether or not the same are, or shall be attached to said building or buildings in any manner. It is hereby agreed that to the extent permitted by law all of the foregoing property and fixtures are to be deemed and held to be a part of and affixed to the realty."

[4] When defendants executed the three Deeds of Trust in 1974, the three towers had not yet been constructed. In 1964, defendants owned of record only leasehold estate interests in the land on which the towers were later constructed. Thereafter, defendants used the proceeds of the three Deed of Trust notes loans to construct the three towers on the land. The fact that defendants own leasehold estates in the land on which defendants constructed the three towers does not mean that defendants own those towers and the fixtures installed therein. Rather, "[a]lterations and improvements made by the tenant ordinarily become the property of the lessor, free from any right of the tenant (except in his capacity as lessee)." 2 *Powell on Real Property* ¶242[1][b][ii] at p. 372.60 (1986). *See G. W. Van Keppel Co. v. United States*, 321 F. Supp. 1183, 1186 (W.D.Mo. 1971). If the tenant erects buildings or installs other permanent improvements upon the premises, including fixtures, then the ownership of these buildings, improvements, and fixtures passes to the lessor, *unless* the lease provides that the tenant owns the buildings which he constructs on the land and/or the permanent improvements and fixtures which he installs therein. Cunningham, Stoebuck & Whitman, *The Law of Property* §6.46 at pp. 357-358 (1984); 2 *Powell on Real Property* ¶246(1)(b)(ii) at p. 372.60 (1986). *See First National Bank of Kansas City v. Nee*, 190 F.2d 61, 67-68 (8th Cir. 1951); *Century Electric Co. v. Terminal Railroad Association of St. Louis*, 426 S.W.2d 58, 60-61 (Mo. 1968); *State v. Vitale*, 411 S.W.2d 174, 177 (Mo. 1967); *Mercantile-Commerce Bank & Trust Co. v. Mid-City Realty*, 156 S.W.2d 730, 736-737 (Mo. 1941).

Security Agreement pledged as security certain personal property located in or attached to or belonging to the tower which was later constructed on the land involved in the corresponding Deed of Trust and Deed of Trust Note.[5]

In each suit plaintiff sought: (1) a monetary judgment against defendants for the amounts due and owing under the respective Deed of Trust Notes, and (2) in order to satisfy the Deed of Trust Notes indebtedness and the monetary judgments against defendants, an order and decree that the respective Deeds of Trust on the respective leasehold estates and the respective Security Agreements be foreclosed and that the property subject to those Deeds of Trust and the property subject to and covered by those Security Agreements be sold.

In the instant case, the leases entered into by Mansion House Center Land Redevelopment Corporation, as lessor, and defendants, as lessees, determine what interests defendants possess in the towers and fixtures and thereby what interests in the towers and fixtures defendants mortgaged by the Deeds of Trust. If, under those leases, defendants, as lessees of the land, do not own the towers and fixtures, then defendants only have leasehold rights in the towers and fixtures. Thus, by the Deeds of Trust, defendants would have mortgaged only leasehold interests in the towers and fixtures. In contrast, if the leases provide that defendants, as lessees of the land, own the towers and fixtures, then, by the Deeds of Trust, defendants mortgaged the fee interests in the towers and fixtures. *See generally,* 51C *C.J.S., Landlord & Tenant* §§44(2) & 50-52 at pp. 125-126 & 151-157 (1968).

[5]Each Security Agreement grants plaintiff:

> "a security interest in the following described property and any and all additions, accessions, and substitutions thereto and therefor (hereinafter called the "Collateral"): all stoves, refrigerators, dishwashers and disposals (Westinghouse), and assorted office, pool and lobby furniture, equipment and devices, signs, objects of art, maintenance, cleaning and garden tools"

located in or attached to or belonging to the three towers constructed on the real estate legally described in the respective Deeds of Trust, i.e., the land on which the three towers are now located.

After litigation spanning numerous years and resulting in a number of decisions both from this Court and from the Eighth Circuit Court of Appeals, on August 12, 1985, Numbers 79-616C(1), 79-617C(1), and 79-618C(1) were tried to this Court sitting without a jury. The parties stipulated that plaintiff was no longer seeking monetary judgments against defendants for personal liability on the Deed of Trust Notes. *See* Stipulation No. 60. The parties further stipulated that, unless defendants prevailed on their sole defense, plaintiff was entitled to a separate judgment in each case that the Deeds of Trust and the Security Agreements be foreclosed and that the realty and property described in those instruments be sold to satisfy the Deed of Trust Notes indebtedness. *See* Stipulation Nos. 57, 59, & 61.

The December 2, 1985, Memorandum and Order

In the four-page Memorandum decision, the Court noted that the parties had "stipulated to all the necessary facts. . . ." (Memorandum, p. 1). The Court incorporated by reference into the Memorandum the parties' stipulations. The Court only briefly reiterated the facts underlying the Mansion House litigation "for purposes of information and clarity." *Id.* In relevant part, the Court stated:

> The Mansion House Center consists of three 28-story towers in downtown St. Louis, Missouri. The three towers are respectively owned by three separate limited partnerships (the Owner Partnerships), namely Mansion House Center Redevelopment Company (Center Tower), Mansion House Center North Redevelopment Company (North Tower) and Mansion House Center South Redevelopment Company (South Tower). The towers were constructed with proceeds from three mortgage loans made in 1964 to the respective Owner Partnerships. These loans totaled over $35 million and were insured by HUD. * * * In 1971, . . . the notes went into default. The private lenders subsequently assigned the notes, deeds of trust and

> security agreements to HUD. In return, HUD was required to pay mortgage insurance claims totaling approximately $35.3 million.
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> * * *
>
> [T]he parties have stipulated . . . that as of May, 1979, payments on the mortgage [notes] were not current. * * * [I]n May, 1979, [HUD] filed these three foreclosure actions. The uncontested evidence introduced at trial by the Government indicated that as of August 12, 1985[6] the amounts due on the mortgages were as follows: North Tower (FHA No. 085-32008) $16,196,724.30; Center Tower (FHA No. 085-32009) $18,159,863.33; and South Tower (FHA No. 085-32010) $18,069,574.47. The parties stipulated that the Government properly declared due and payable, the entire principal sum and accrued interest as provided in each note, deed of trust and security agreement. Finally, the parties stipulated that the United States is entitled to a separate judgment in each of the foreclosure cases, subject to the defendants' defense that HUD should be compelled to settle these cases under terms contained in the August 18, 1982 settlement, as amended.

Memorandum Decision, December 2, 1985, pp. 1-2.

The Court proceeded to consider defendants' sole defense. (Memorandum, p. 3). The Court "reject[ed] the sole defense asserted by the Owner Partnerships," rendered judgment in plaintiff's favor in each of the three cases, and "direct[ed] that the three towers collectively known as the Mansion House Center be sold according to the terms of the attached Order of this Court." (Memorandum, p. 4). This decision was affirmed on appeal. 796 F.2d 1039.

The Court's attached Order stated:

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[6] The day of the bench trial.

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that a judgment be and is entered in favor of the plaintiff in each of these three causes of action.

The Order further ordered the United States Marshal to sell:

all of the realty described in the Deeds of Trust for FHA No. 085-32008 (North Tower), FHA No. 085-32009 (Center Tower) and FHA No. 085-32010 (South Tower), to the highest bidder for cash.

The Order then set forth the procedures for the Marshal to follow in selling the realty.

Omissions and Oversights

As the brevity of the Court's Memorandum and Order indicates, and by the Court's incorporation by reference of the parties' stipulations, both the Memorandum and Order were intended to be read in the context of: (1) the three complaints, (2) the preceding decisions of this Court and of the Eighth Circuit in the Mansion House litigation, and, most importantly, (3) the parties' 61 stipulations of fact (some 19 pages). The Court's desire for brevity caused the Court to omit various understood facts and conclusions. Other understood facts and conclusions were apparently omitted due to oversight. The Court notes the following omissions and oversights in the Memorandum and in the Order:

1. The Memorandum fails to state that the respective defendants executed the respective Deed of Trust Notes, Deeds of Trust, and Security Agreements, and fails to state that HUD is the lawful holder of the Notes, Deeds of Trust and Security Agreements.

2. The Memorandum fails to state that defendants are lessees of the land underlying the Mansion House

Center towers and fails to state that the Deeds of Trust are leasehold mortgages.

3. The Memorandum fails to conclude that the amounts due on the three Deed of Trust Notes were: $18,159,863.33 (Center Tower; No. 79-616C(1)), $16,196,724.30 (North Tower; No. 79-617C(1)), and $18,069,574.47 (South Tower; No. 79-618C(1)).

4. The Memorandum fails to conclude that the respective Deeds of Trust and the respective Security Agreements should be foreclosed.

5. The Order fails to order the foreclosure of the respective Deeds of Trust and the respective Security Agreements.

6. The Order fails to order the sale of the property subject to and covered by the respective Security Agreements, and the Order fails specifically to order the sale of the entirety of defendants' interests in the towers and fixtures mortgaged by the Deeds of Trust.

Most of the information referred to in the omitted facts and conclusions is contained in the parties' stipulations, specifically Stipulations Nos. 22, 23, 28, 34, 35, 40, 46, 47, 52, 56, 58, 59, and 60.

Sale of Fixtures and Personal Property

The second element of plaintiff's requested relief seeks to have the Marshal sell the Mansion House Center towers' fixtures and certain other personal property. The entirety of defendants' interests in the towers and fixtures were mortgaged by the Deeds of Trust. *See supra* footnotes 3 and 4 and accompanying text. The personal property is the property which is subject to and covered by the Security Agreements. *See supra* footnote 5 and accompanying text.

Upon review of the parties' stipulations, the exhibits introduced at trial, the decisions of this Court and of the Eighth Circuit in the Mansion House litigation, and of the Court's December 2, 1985, Memorandum and Order, it is clear to this Court that the Court intended, the parties understood, and the defendants stipulated that the Deeds of Trust and the Security Agreements would be foreclosed because defendants did not prevail on their sole defense. *See* Stipulations Nos. 6, 15, 56, and 59. Further, the Court intended, the parties understood, and defendants stipulated that the entirety of defendants' interests in the property described in and mortgaged by the Deeds of Trust would be sold to satisfy the Deed of Trust Notes indebtedness. *See* Stipulation No. 59. Thus, in addition to having the Marshall sell defendants' leasehold estate interests in the land, plaintiff is and was entitled to have the Marshal sell the entirety of defendants' interests in the towers and fixtures mortgaged by the Deeds of Trust (that is, defendants' leasehold interests in the towers and fixtures *and* defendants' fee interests, if any, in the towers and fixtures). Likewise, the Court intended, the parties understood, and defendants stipulated that plaintiff is and was entitled to have the United States Marshal sell all of the property subject to and covered by the Security Agreements in order to satisfy the Deed of Trust Notes indebtedness. *See* Stipulation No. 59.

In this light, the failure of the Court's December 2, 1985, Memorandum and Order to grant all of the above relief to plaintiff and, specifically, the failure to order the foreclosure of the Deeds of Trust and the Security Agreements, and to order the sale of the entirety of defendants' interests in the fixtures and towers described in and mortgaged by the Deeds of Trust, and to order the sale of the property subject to and covered by the Security Agreements, is a clear error arising from, resulting from, and caused by the Court's omissions and oversights. In this protracted litigation, justice clearly requires that the Court enter an order correcting this error of omission and oversight.

This error of omission and oversight may be corrected by the Court pursuant to Fed.R.Civ.P. 60(a).

In order to rectify this error arising from the omissions and oversights in the December 2, 1985, Memorandum, the Court hereby makes the following conclusions and hereby incorporates these conclusions into the December 2, 1985, Memorandum:

1. The Deed of Trust Note in No. 79-616C(1) (FHA No. 085-32009) is secured by the Deed of Trust and by the Security Agreement which plaintiff seeks to foreclose in that suit. The Deed of Trust Note in No. 79-617C(1) (FHA No. 085-32008) is secured by the Deed of Trust and by the Security Agreement which plaintiff seeks to foreclose in that suit. The Deed of Trust Note in No. 79-618C(1) (FHA No. 085-32010) is secured by the Deed of Trust and by the Security Agreement which plaintiff seeks to foreclose in that suit.

2. As of August 12, 1985, defendants were, and as of this date are, in default on the three Deed of Trust Notes. As of August 12, 1985, defendants owed plaintiff the following amounts: $18,159,863.33 on the Note which is the subject of No. 79-616C(1); $16,196,724.30 on the Note which is the subject of No. 79-617C(1); and $18,069,574.47 on the Note which is the subject of No. 79-618C(1).

3. As defendants are in default on the three Deed of Trust Notes, plaintiff is entitled to foreclosure on the three Deeds of Trust and on the three Security Agreements.

4. In order to satisfy the Deed of Trust Notes indebtedness, plaintiff is entitled to have the United States Marshal sell defendants' leasehold estate in-

> terests in the land and the entirety of defendants' interests in the towers and the fixtures therein, as the property described in and mortgaged by the Deeds of Trust, and is entitled to have the United States Marshal sell the property which is subject to and covered by the three Security Agreements.

To the extent that plaintiff in its motion requests the sale of the entirety of defendants' interests in the towers and the fixtures therein, as the property described in and mortgaged by the Deeds of Trust, and requests the sale of the personal property which is subject to and covered by the Security Agreements, plaintiff's Motion for Supplemental Order is granted and defendants' motion is denied. Accordingly, pursuant to Fed.R.Civ.P. 60(a), the Court directs the United States Marshal to sell according to the terms of a forthcoming Supplemental Order of the Court: the entirety of defendants' ownership interests under the three leases described in and mortgaged by the three Deeds of Trust, specifically including defendants' leasehold interests in the land, the towers, and the fixtures, and defendants' fee interests, if any, in the towers, and defendants' fee interests, if any, in the fixtures therein, together with the personal property which is subject to and covered by and described in the Security Agreements and which is located in or attached to or belonging to the three towers collectively known as the Mansion House Center.

Sale of Defendants' Interest in the Mansion House Center Land Redevelopment Corporation

At the time they executed the Deeds of Trust leasehold mortgages, defendants did not own the land on which the three towers are now located. Rather, Mansion House Center Land Redevelopment Corporation was the fee owner of the land on which the three towers are now located. On April 21, 1964, Mansion House Center Land Redevelopment Corporation leased the land on which the three towers are now located to defen-

dants.[7] The leases created leasehold estates owned by defendants. After the execution of the leases, Mansion House Center Land Redevelopment Corporation owned the reversionary interest — the fee interest — in the land.[8] *See* 2 *Powell on Real Property* ¶246[1] at p. 372.83 (1986); Cunningham, Stoebuck & Whitman, *The Law of Property* §6.12 at 268 (1984). By virtue of a consent judgment, entered on January 10, 1984, in the Circuit Court of Cole County, Missouri, defendants now own all of the beneficial interest in Mansion House Center Land Redevelopment Corporation. Presumably, this interest is represented by shares of stock. Mansion House Center Land Redevelopment Corporation is not a party to this litigation or to any other of the Mansion House litigation in federal court.

The three Deeds of Trust are leasehold mortgages. *See* December 1, 1984, Commitment for Title Insurance Issued by Stewart Title; Schedule A, item 2. Defendants mortgaged only their ownership interests under the three leases. They did not mortgage their beneficial interest in Mansion House Center

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[7] Mansion House Center Land Redevelopment Corporation leased the north parcel to Mansion House Center North Redevelopment Company. Mansion House Center Land Redevelopment Corporation leased the center parcel to Mansion House Center Redevelopment Company. Mansion House Center Land Redevelopment Corporation leased the south parcel to Mansion House Center South Redevelopment Company.

[8] On April 21, 1964, Mansion House Center Land Redevelopment Corporation also: (1) executed Deeds of Trust securing the land only in favor of the General Electric Pension Trust; (2) assigned the three leases to the General Electric Pension Trust, with the consent of the three tenants; and (3) granted options to purchase the fee simple title to the General Electric Pension Trust. Thus, the General Electric Pension Trust became the beneficial owner of the land underlying the three towers. *See Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759, 761 n. 1 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). The December 1, 1984, Commitment for Title Insurance Issued by Stewart Title does not indicate any later transfers of the fee interest in the land or any later assignments of the lessor's interests under the three leases.

Land Redevelopment Corporation. They did not mortgage the reversionary interest — the fee — owned by Mansion House Center Land Redevelopment Corporation. Thus, plaintiff has not shown any entitlement to the foreclosure of defendants' interest in Mansion House Center Land Redevelopment Corporation. It is conceivable that in the voluminous records which comprise this "case", there is some support for plaintiff's contention. If so, either or both of the parties should forthwith report same to this Court. Therefore, to the extent plaintiff seeks the sale of defendants' interest in Mansion House Center Land Redevelopment Corporation, plaintiff's Motion for Supplemental Order is denied and defendants' Motion to Dismiss is granted.

/s/ John F. Nangle
United States District Judge

Date: December 24, 1987

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Consolidated Action Nos.
76-20C(1), 79-616C(1), 79-617C(1), 79-618C(1)

United States of America,
Plaintiff,

v.

Mansion House Center Redevelopment Company, et al.,
Defendants.

ORDER

(Filed Dec. 24, 1987)

Pursuant to the memorandum filed herein this day and pursuant to Fed.R.Civ.P. 60(a),

IT IS HEREBY ORDERED that plaintiff United States of America's motion for supplemental order be and is granted in part and denied in part.

IT IS FURTHER ORDERED that defendants Mansion House Center Redevelopment Company, et al.'s motion to dismiss plaintiff's motion for supplemental order for lack of jurisdiction be and is granted in part and denied in part.

IT IS HEREBY DETERMINED that, as of August 12, 1985, the aggregate Deed of Trust Notes indebtedness owed by defendants to plaintiff was $52,426,162.20.

IT IS FURTHER ORDERED that the three Deeds of Trust referred to in plaintiff's complaints, and recorded on April 21, 1964, in Book 8489 at pages 130, 145, and 162, be and hereby are foreclosed.

IT IS FURTHER ORDERED that the three Security Agreements referred to in plaintiff's complaints be and hereby are foreclosed.

IT IS FURTHER ORDERED that a forthcoming supplemental order of Court shall determine what realty and property the United States Marshal will sell and what procedures the United States Marshal will follow in selling said realty and property.

/s/ John F. Nangle
United States District Judge

Dated: December 24, 1987

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Consolidated Action Nos.
76-20C(1), 79-616C(1), 79-617C(1), 79-618C(1)

United States of America,
Plaintiff,

v.

Mansion House Center Redevelopment Company, et al.,
Defendants.

SUPPLEMENTAL ORDER

(Filed Jan. 22, 1988)

Pursuant to the Court's order and memorandum filed December 24, 1987, and pursuant to Fed.R.Civ.P. 60(a),

IT IS HEREBY DETERMINED that, as of August 12, 1985, the aggregate Deed of Trust Notes indebtedness owed by defendants to plaintiff was $52,426,162.20.

IT IS HEREBY ORDERED that the three Deeds of Trust referred to in plaintiff's complaints, and recorded on April 21, 1964, in the Office of the Recorder of Deeds for the City of St. Louis, Missouri, in Book 8489 at pages 130, 145, and 162, be and hereby are foreclosed.

IT IS FURTHER ORDERED that, upon the United States Marshal's issuance of his certificate(s) of sale for the property subject to the three Security Agreements referred to in plaintiff's complaints, the three Security Agreements shall thereupon be foreclosed and the security interests arising thereunder shall be discharged.

IT IS FURTHER ORDERED that the United States Marshal be and is authorized and be and hereby is directed to sell to the highest bidder for cash at public vendue between the hours of 9:00 a.m. and 5:00 p.m. at the east front door of the Court House (Civil Courts Building, Eleventh and Market Streets) in the City of St. Louis, Missouri, on such dates as he shall determine but as expeditiously as practicable, the following described realty and property:

(A) The entirety of defendants' ownership interests in realty and property under the three leases entered into by Mansion House Center Land Redevelopment Corporation, as lessor, and defendants, as lessees, and recorded on April 21, 1964, in the Office of the Recorder of Deeds for the City of St. Louis, Missouri, in Book 8489 at pages 84, 99, and 115, and described in and mortgaged by the three Deeds of Trust referred to in plaintiff's complaints and foreclosed above, and specifically including the following realty and property:

(1) Defendants' leasehold estate interests in the land underneath the three Mansion House Center towers; and

(2) Defendants' leasehold interests in the three Mansion House Center towers and the fixtures installed therein; and

(3) Defendants' fee ownership interests, if any, in the three Mansion House Center towers and the fixtures installed therein as determined by the three leases referred to above; and

(B) Except for objects of art, all of the property owned by defendants and subject to, covered by, and described in the three Security Agreements referred to in plaintiff's complaints, and specifically including the following property: all stoves, refrigerators, dishwashers and disposals (Westinghouse), and assorted office, pool and lobby furniture, equipment and devices, signs, maintenance, cleaning and garden tools, located in, attached to, belonging to, associated with, or identified with the three Mansion House Center towers.

IT IS FURTHER ORDERED that the United States Marshal shall follow the following procedure in selling the above described realty and property:

(1) The United States Marshal is authorized and directed to effect notice of the sale by publication once a week for at least four weeks prior to the sale in a newspaper regularly issued and of general circulation in the City of St. Louis, Missouri. The Secretary of Housing and Urban Development, at his discretion, may direct additional publication in other newspapers outside the St. Louis area. Said sale shall be conducted on the date and time determined by the United States Marshal.

(2) The United States Marshal shall offer all of the above described realty and property for sale in bulk (as one unit).

(3) The United States Marshal shall then offer the above described realty and property for sale as three separate parcels, with each parcel consisting of the entirety of the realty and property owned by a defendant under one of the three leases together with the property described in the Security Agreement associated with the tower located on the land leased in that lease, except objects of art.

(4) The higher of the total amounts bid under (2) and (3) above shall be the successful bid (or bids) for the above described realty and property.

(5) A sale of the above described realty and property shall be deemed to be for cash if the successful bidder (for a bulk sale) or the successful bidders (for separate parcel sales) shall each deposit with the United States Marshal, not later than 24 hours after the sale shall have been concluded, cashier's or certified check(s) payable to the Marshal in an amount not less than the greater of (a) $1,000,000.00 and (b) 5% of the bid price(s), and shall within 30 days after the conclusion of the sale have deposited with the Marshal cashier's or certified check(s) payable to the Marshal for the balance of the bid price(s).

(6) Within five working days following the conclusion of the sale of the above described realty and property, the United States Marshal shall file this report of the sale with this Court, who will sua sponte, and upon such notice as this Court deems appropriate, set the matter for confirmation of the sale. Upon confirmation of the sale and receipt by the Marshal of the full purchase price(s) from the successful bidder(s) for the above described realty and property, the Marshal shall issue his certificate(s) of sale for the realty and property. The Marshal shall then deduct from the total sale proceeds, and shall retain, all of his costs and expenses of sale. The Marshal shall then calculate the net proceeds of the sale of the above described realty and property by deducting from the total sale proceeds all of the Marshal's costs and expenses of sale.

IT IS FURTHER ORDERED that the United States Marshal be and is authorized and be and hereby is directed to sell to the highest bidder for cash, on such date as he shall determine but as expeditiously as practicable, all of the objects of art owned by defendants and subject to, covered by, and described in the three Security Agreements referred to in plaintiff's complaints and located in, attached to, belonging to, associated with, or identified with the three Mansion House Center towers or on loan to the Missouri Botanical Garden.

IT IS FURTHER ORDERED that the United States Marshal shall follow the following procedure in selling the above described objects of art:

(1) The United States Marshal, through the expert auctioneer to be retained by the Marshal pursuant to the next following paragraph, shall offer the objects of art for sale as separate pieces.

(2) The United States Marshal is authorized and directed to obtain an offer from an expert auctioneer, such as Christie's, to conduct the sale of the objects of art. Said offer shall contain the auctioneer's proposed contract terms for conducting the sale

and the auctioneer's proposed procedures for selling the objects of art. The auctioneer's proposed procedures should be standard auctioneering procedures for selling like objects of art, except where the auctioneer deems non-standard procedures necessary due to the circumstances of this particular sale. The auctioneer's proposed procedures should include a proposed location for the sale, proposed notice by publication or otherwise of the sale, and proposed procedures for the payment of bids in cash (which may include cashier's or certified checks payable to the Marshal or to the auctioneer). The Marshal shall submit the auctioneer's offer to the Court for approval. If the Court determines that the offer is in the best interests of the estate, the Court, upon such notice as it deems appropriate, will approve the Marshal's selection of an auctioneer and will authorize and direct the Marshal to accept the Auctioneer's offer and, by contract, to retain the services of the auctioneer to conduct the sale of the objects of art.

(3) After the United States Marshal has retained the services of the auctioneer, the Marshal, through the auctioneer, shall sell the objects of art pursuant to the procedures contained in the auctioneer's offer. Said sale shall be conducted on the date and time determined by the Marshal. The Marshal is authorized and directed to effect notice of the sale of the objects of art by the notice procedures contained in the auctioneer's offer and also is authorized and directed to effect notice of the sale of the objects of art by publication once a week for at least four weeks prior to the sale in a newspaper regularly issued and of general circulation in the City of St. Louis, Missouri. The Secretary of Housing and Urban Development, at his discretion, may direct additional publication in other newspapers outside the St. Louis area.

(4) Within five working days following the conclusion of the sale of the objects of art, the United States Marshal shall file his report of the sale with this Court, who will sua sponte, and upon such notice as this Court deems appropriate, set the mat-

ter for confirmation of the sales of the objects of art. Upon confirmation of the sales and receipt by the Marshal of the full purchase price(s) from the successful bidder(s) for the objects of art, the Marshal shall issue his certificate(s) of sale for the objects of art. The Marshal shall then deduct from the total sale proceeds, and shall retain, all of his costs and expenses of sale (which shall include the auctioneer's fee as determined by the contract between the Marshal and the auctioneer). Upon approval from the Court, the Marshal shall pay the auctioneer pursuant to the terms of the contract between the Marshal and the auctioneer. The Marshal shall calculate the net proceeds of the sale of the objects of art by deducting from the total sale proceeds all of the Marshal's costs and expenses of sale.

IT IS FURTHER ORDERED that the United States Marshal shall follow the following procedure in distributing the net proceeds of the sales of the realty and property and of the objects of art:

(1) Should the sum of the net proceeds of the sale of the realty and property and of the objects of art be sufficient to satisfy in full the aggregate Deed of Trust Notes indebtedness due and owing the United States of America and hereinbefore determined by the Court, then the Marshal shall cause to be paid from the sum of the net proceeds to the Secretary of Housing and Urban Development such amount as shall be necessary to pay in full the aggregate Deed of Trust Notes indebtedness. The Marshal shall then certify to the Court that the aggregate Deed of Trust Notes indebtedness has been paid and shall certify to the Court the amount of any remaining portion of the sum of the net proceeds. The Court, after such notice as the Court deems appropriate, will then order the Marshal to pay the remaining portion of the sum of the net proceeds to defendants.

(2) Should the sum of the net proceeds of the sales of the realty and property and of the objects of art be insufficient to satisfy in full the aggregate Deed of Trust Notes indebtedness

due and owing the United States of America and hereinbefore determined by the Court, the United States Marshal shall cause to be paid to the Secretary of Housing and Urban Development the full amount of the sum of the net proceeds. The Marshal shall then certify to the Court the amount that has been paid to the Secretary and the amount by which the aggregate Deed of Trust Notes indebtedness remains unsatisfied.

IT IS FURTHER ORDERED that, after the Marshal has issued his certificates of sale, the Court will order Gerald A. Rimmel, the Receiver in No. 76-20, to terminate the Receivership and to provide an accounting. Pursuant to the accounting and after the Receiver has paid or made allowance for any final claims, liabilities, and expenses, the Receiver shall certify to the Court the amount of any funds, such as cash on hand and in banks, certificates of deposit, repurchase agreements, securities, and accounts receivable, which he possesses or controls in his capacity as Receiver. After such notice as the Court deems appropriate and after the Secretary of Housing and Urban Development indemnifies the Receiver against future liability in an amount and upon such terms as the Court determines is necessary for the protection of the Receiver, the Court will order the Receiver to pay to the Secretary such portion of those funds as shall be necessary to satisfy in full the unsatisfied portion of the Deed of Trust Notes indebtedness. Thereafter, and in the event that there remain any funds in the hands of the Receiver after the mortgage indebtedness due the United States of America shall have been fully satisfied, then and in that event the Receiver shall again certify to the Court the amount of any funds in his possession. After such notice as the Court deems appropriate and after defendants indemnify the Receiver against future liability in an amount and upon such terms as the Court determines is necessary for the protection of the Receiver, the Court will then order the Receiver to pay all of those remaining funds to defendants.

IT IS FURTHER ORDERED that, upon receipt by the Secretary of Housing and Urban Development of sale proceeds from the United States Marshal and of any funds from the Receiver, the Secretary shall discharge the aggregate non-recourse Deed of Trust Notes indebtedness, subject only to the rights reserved to the Secretary under paragraph 17 of the Regulatory Agreements.

IT IS FURTHER ORDERED that the United States Marshal and the auctioneer retained by the Marshal shall make no representations as to title to the realty and property and objects of art subject to the sales herein, but the quality and condition of title shall be at the sole risk of the successful bidder(s).

/s/ John F. Nangle
United States District Judge

Dated: January 22, 1988

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-633

In the Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, ET AL. PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, ET AL. PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court lacked the power to modify its previously entered judgment, which had been affirmed on appeal, under Fed. R. Civ. P. 60(a).

1. In 1979, the United States filed three foreclosure actions. In December 1985, the district court entered judgment in favor of the United States in each of the cases and ordered a foreclosure sale (Pet. App. A6-A9). Petitioners appealed, and the Eighth Circuit affirmed. *United States* v. *Mansion House Center Redevelopment Co.*, 796 F.2d 1039 (1986).

The December 1985 decision of the district court incorporated by reference stipulations of the parties, including a stipulation that the United States was entitled to foreclose on the security, which included both personal and real property, if petitioners' one legal defense proved insufficient (Pet. App. A6, A8). That defense—that the Department of Housing and Urban Development was re-

quired to resolve the case in accordance with a 1982 settlement agreement – was rejected (*id.* at A9), and the district court entered judgment in favor of the United States in each of the cases. In a separate section of the order, the district court set forth the procedures that were to govern the sale of the security. Those procedures did not specifically mention personal property at the buildings but seemed to subsume the personal property into the real property and to treat both as one (*id.* at A10-A12). Thus, after affirmance of the order by the Eighth Circuit, the United States moved to have the procedures set forth in the 1985 order modified so as explicitly to authorize sale of the personal property.

In December 1987 the district court granted the United States' motion in part (Pet. App. A13-A31), and in January 1988 it entered a supplemental order directing the judicial sale of the personal property (*id.* at A32-A39). Petitioners appealed again, and the Eighth Circuit again affirmed (*id.* at A1-A5).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

a. Petitioners' contention concerning the type of error that can be corrected under Rule 60(a) is without merit. Under that Rule, the district court has the power to correct omissions in its judgment so as to reflect what was understood, intended, and agreed on by the parties and the court. See, *e.g.*, *Blanton* v. *Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987) (deletion of unintended award of prejudgment interest); *In re Jee*, 799 F.2d 532, 534-535 (9th Cir. 1986) (amendment of dismissal order to reflect judge's intention that dismissal be without prejudice), cert. denied, No. 86-1378 (Apr. 20, 1987). The district court's power includes the authority to award additional relief

contemplated at the time of entry of the judgment but inadvertently omitted therefrom. See, *e.g.*, *Chavez* v. *Balesh*, 704 F.2d 774 (5th Cir. 1983) (increase of damage award to include liquidated damages); *Trujillo* v. *Longhorn Mfg. Co.*, 694 F.2d 221 (10th Cir. 1982) (increase in backpay award to reflect correct number of weeks plaintiff was unemployed); *Hayden* v. *Scott Aviation, Inc.*, 684 F.2d 270 (3d Cir. 1982) (increase of damage award to reflect delay damages under state law); see also *Pattiz* v. *Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968) (Blackmun, J.).

Here, it is undisputed that the parties intended that the personal property as well as the real property be sold to satisfy petitioners' debt to the government if, as proved to be the case, the courts rejected petitioners' defense to the foreclosure action. Stipulations to that effect were incorporated by reference in the judgment. The district court therefore had ample power under Rule 60(a) to conform its judgment to the original intent of the parties and the court.

Petitioners state that the decision in this case conflicts with the panel decision in *Willie* v. *Continental Oil Co.*, 746 F.2d 1041 (1984), vacated, 760 F.2d 87 (1985), appeal dismissed en banc, 784 F.2d 706 (5th Cir. 1986). Petitioners incorrectly indicate (Pet. 6) that the panel decision was "*aff'd en banc*, 784 F.2d 706 (5th Cir. 1986)." To the contrary, the panel opinion was vacated, and the en banc court did not endorse the panel's reasoning or even reach the same ultimate result.

The en banc court did hold (784 F.2d at 707) that the motion at issue was properly brought under Fed. R. Civ. P. 59(e) rather than Rule 60(a), but it did not explain the basis for that holding. In any event, *Willie* is distinguishable on its facts from the present case. In *Willie*, the district court entered judgment in favor of the

plaintiff against one defendant and also awarded that defendant a right of contribution against another defendant that had previously settled with the plaintiff. The award of contribution was contrary to a pretrial stipulation, but—unlike this case—the district court did not incorporate that stipulation into its judgment by reference. When the district court did eventually amend its judgment to reduce the plaintiff's recovery and release the settling defendant from the contribution requirement previously imposed, the court was quite clearly doing something other than carrying out its own original intent. Here, by contrast, there is no doubt that the district court intended all along that petitioners' personal property would be sold to satisfy their debt, and the problem in the judgment lay only in the district court's draftsmanship. There is no inconsistency between *Willie* and the result reached here.*

b. Relying on two 1940 court of appeals cases, a concurring opinion in a 1958 court of appeals case, and a 1945 district court decision, petitioners also incorrectly argue (Pet. 9) that the decision in this case creates a conflict concerning the jurisdiction of the district courts, after issuance

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* Nor is there any inconsistency between the decision below and *Charles* v. *Daley*, 799 F.2d 343 (7th Cir. 1986), or *Mullins* v. *Nickel Plate Mining Co.*, 691 F.2d 971 (11th Cir. 1982). In *Charles*, a complex attorneys' fees dispute bearing no resemblance to the present case, the court simply held that "Rule 60(a) is designed to correct scriveners' errors, to make the judgment carry out the original plan" (799 F.2d at 347)—a description that did not fit the relief sought in *Charles* but precisely fits the relief granted here. See also *United States* v. *Griffin*, 782 F.2d 1393, 1397 (7th Cir. 1986) ("The thread uniting these cases is that factual and legal misconceptions, as well as exercises of discretion, may not be corrected under Rule 60(a), while blunders in execution may be."). In *Mullins*, the district court attempted retroactively to certify its order granting partial summary judgment as an appealable order under Fed. R. Civ. P. 54(b), an effort that the court of appeals held that Rule 60(a) does not sanction.

of an appellate mandate, to modify a judgment. Before 1976, many courts, including the Eighth Circuit, indicated that a district court lacks jurisdiction to entertain a Rule 60 motion after its judgment has been affirmed on appeal, unless the appellate court first grants leave to allow the district court to do so. In 1976, however, this Court held that, without leave of the appellate court, a district court can entertain a Rule 60(b) motion after its judgment has been affirmed. *Standard Oil Co.* v. *United States,* 429 U.S. 17, 19 (1976) (per curiam). Thereafter, the appellate courts have uniformly ruled that without leave of the appellate court a district court can entertain a motion under Fed. R. Civ. P. 60(a) after its judgment has been affirmed. See, *e.g., Panama Processes, S.A.* v. *Cities Service Co.,* 789 F.2d 991, 993-995 (2d Cir. 1986); *Dura-Wood Treating Co.* v. *Century Forest Industries,* 694 F.2d 112, 114-115 (5th Cir. 1982). Moreover, petitioners did not raise or brief in the Eighth Circuit any issue concerning the "mandate rule" for which they now contend, and the Eighth Circuit accordingly did not address the issue in its opinion. Consideration of that issue by this Court is thus foreclosed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1988

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No. 88-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

MEMORANDUM FOR PETITIONERS IN REPLY

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Rules:

Fed. R. Civ. P.:

Rule 60(a) 2,3

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No. 88-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANSION HOUSE CENTER NORTH REDEVELOPMENT COMPANY, *et al.*,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

MEMORANDUM FOR PETITIONERS IN REPLY

Respondent incorrectly implies that the December, 1985 district court judgment incorporated the stipulation of the parties regarding the foreclosure of both realty and personalty securing the loan to petitioners. The court's memorandum opinion incorporates by reference in a prefatory paragraph the pleadings, documents in evidence and stipulations of the parties as the basis for the Court's judgment, but nowhere does the Court adopt the parties' stipulations as the Court's ruling.

> The Court having considered the pleadings, the documents in evidence, and the stipulations of the parties which are incorporated herein by reference, and being fully advised

> in the premises, hereby makes the *following* findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure.

Pet. App. A-6 (emphasis added).

The Court's only finding based upon the parties' stipulations was that HUD's decision to foreclose was consistent with national housing objectives (Pet. App. A-8). Respondent cannot overcome the complete absence of any order concerning the foreclosure of the personalty. In fact, even the district court recognized that respondent's motion to supplement the judgment to foreclose the personalty (filed thirteen months after the December 1985 judgment and after the judgment was affirmed on appeal) was a request for "additional relief". (Pet. App. A-14). If the district court had intended to foreclose petitioners' interests in the personalty in its December 1985 order, the court would not have characterized respondent's motion as a request for "additional relief". The simple answer is that the district court did not intend to reach the issue of petitioners' security interest in the personalty in its December 1985 order. Therefore, a motion under Fed. R. Civ. P. 60(a) to make the judgment conform to what was intended would not lie.

The cases respondent cites for the proposition that the district court has the power to award additional relief contemplated at the time judgment was entered are typical examples of "clerical errors" remediable under Rule 60(a), such as where the court erred mathematically in computing damages or omitted relief mandated by statute. None of these cases deals with a substantive change in a judgment, which occurred here. The district court lacks power to effect such changes under Rule 60(a). "Errors that affect substantial rights of the parties, however, are beyond the scope of Rule 60(a)." *Mullins v. Nickel Plate Mining Co.*, 691 F. 2d 971, 973 (11th Cir. 1982).

The situation presented in this case is identical to that facing the Fifth Circuit in *Willie v. Continental Oil Co.*, 746 F. 2d

1041, *vacated,* 760 F. 2d 87 (1985), *appeal dismissed,* 754 F. 2d 706 (5th Cir. 1986), where the court was asked to open up a judgment under Rule 60(a) to conform the judgment to the parties' pretrial stipulation. Respondent attempts to distinguish *Willie* on the grounds that in *Willie* the court was doing something other than what it originally intended, whereas in the present case the court was merely making the judgment conform to what it originally intended.

In *Willie,* 746 F. 2d at 1045, the Fifth Circuit held that the trial court could not act pursuant to Rule 60(a) because the rule was designed to correct clerical or amanuensis-type mistakes, and not errors of substantive judgment or errors that determine substantive rights of the parties. Although the Fifth Circuit eventually vacated and dismissed the appeal in *Willie,* the court's order dismissing the appeal clearly by implication held that the relief sought (to amend the judgment to conform to the parties' stipulation) was *not* available under Rule 60(a). *See Willie,* 784 F. 2d at 707. As noted above, the district court in the present case did *not* adopt the parties' stipulations as part of its judgment, and when later faced with a motion to conform the judgment to the stipulation, deemed such motion a request for "additional relief." *Willie* is thus entirely inconsistent with the result reached by the district court here.

Finally, the mandate rule bars the relief granted by the district court in this action. Respondent appears to argue that because the cases cited by petitioners are not of recent vintage they should be ignored, even though respondent does not dispute that these cases are in conflict with the position taken by the Eighth Circuit in the present action. Respondent further incorrectly contends that *Standard Oil Co. v. United States,* 429 U.S. 17, 19 (1976) (per curiam), is dispositive.

The jurisdiction of the district court to act under Rule 60(a) after issuance of the appellate court's mandate has never been decided by this Court. The only courts squarely facing this issue

have decided that the district court has no jurisdiction to act. *Standard Oil* merely abolished the judicially created appellate-leave requirement for filing Rule 60(b) motions after the appeal had been docketed. Unlike the Rule 60(b) situation requiring the opening of a judgment after the discovery of new evidence or to rectify matters occurring after trial, Rule 60(a) exists to correct clerical errors not affecting the substantive rights of the parties. Allowing the district court to act pursuant to Rule 60(a) after the issuance of the mandate makes no sense because the judgment merges in the mandate. The district court has no jurisdiction to alter or amend the mandate. Its jurisdiction is limited to executing the mandate according to its terms. The district court had no jurisdiction in the present case to act.

Petitioners therefore respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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